United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7374

UNITED STATES COURT OF APPEALS SECOND CIRCUIT

VANESSA TAYLOR, on behalf of herself and all other persons similarly situated,

APPELLANTS,

\- against -

CONSOLIDATED EDISON CO. of NEW YORK, INC.; CHARLES F. LUCE, individually, and in his capacity as Chairman of CONSOLIDATED EDISON CO. of NEW YORK, INC.: ARTHUR HAUSPURG, individually, and in his capacity as President of CONSOLIDATED EDISON CO. of NEW YORK, INC.; THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; ALFRED E. KAHN, individually, and in his capacity as Chairman of the Public Service Commission of the State of New York; and EDWARD P. LARKIN, CARMEL CARRINGTON MARR, HAROLD A. JERRY, JR., and EDWARD BERLIN, each individually and in his capacity as Commissioner of the Public Service Commission of the State of New York, CONNIE BOHAN, as agent of the Public Service Commission,

APPELLEES.

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C.A. DOCKET

NO. 76-7374

P/S

AN APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS/APPELLEES

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ISSUES PRESENTED FOR REVIEW

1. Whether there is action under color of state law when a public utility terminates service to a customer by entering

onto the grounds of the property on which she is a tenant and disconnecting her meter on one day's notice if: a) the customer has been found to be taking service through a tampered meter which does not record the quantity of electricity used; b) such conduct violates the utility's tariff and constitutes grounds for disconnection of service; c) the tariff provisions violated by the customer have been filed with the New York State Public Service Commission ("PSC") pursuant to state law; and d) the tariff filing became effective after a period provided in the statute when the PSC did not suspend or otherwise reject it.

2. Whether the common law of New York permits peaceful entry by a utility employee onto a customer's property for the purpose of removal or disconnection of a meter in order to terminate the continued unauthorized use of electric current by the customer.

3. Whether a notice by a public utility to a customer found taking service through a tampered meter that service would be disconnected if the customer did not promptly call a utility at a given telephone number, and the disconnection of utility service one day later after the customer failed to call to arrange for payment of service taken through the tampered meter,

constituted a deprivation of due process of law.

4. Whether affording less notice and opportunity for a hearing to a customer who is threatened with disconnection of utility service after discovery that she has been taking service through a tampered meter than is afforded to a customer threatened with discontinuance of service for non-payment of bills constitutes a denial of equal protection of the law.

STATEMENT OF THE CASE

On March 11, 1976, an employee of defendant Consolidated Edison Company of New York, Inc. ("Con Edison" or the "Company") discovered that the Company's electric meter located on the outside wall of the building at 273 Gordon Street, Staten Island, and serving the first floor apartment of a two-family house had been tampered with preventing the meter from recording the electricity used by the customer in the apartment. The Company employee looked for the occupant of the apartment and finding no one there, left a printed notice stating that the tampered meter had been found; that the Company should be contacted immediately after the receipt of the notice at a given telephone number; and that failure to call would be cause for disconnection of service

without further notification (A. 43-46*). The lessee and occupant of the first floor apartment described above, and Con Edison's customer of record for the same apartment was Vanessa Taylor, the individual plaintiff herein.

Plaintiff Taylor became defendant Con Edison's customer of record at the involved premises as of December 16, 1975. On that day, the meter serving her apartment read 4,012 kilowatt-hours (kwhrs). On February 19, 1976, after more than two months occupancy by plaintiff, the meter was read and it still showed 4,012 kwhrs. On March 12, 1976, the meter read 4,112 kwhrs, an advance of 100 kwhrs (A. 96). The condition of the meter indicated that the meter dial showing the advance of 100 kwhrs had been tampered with and manually advanced the 100 kwhrs (A. 94).

On March 12, 1976, about twenty-four hours after the discovery of the tampered meter, with no call to the Company by the plaintiff, or any other contract from her, her meter was disconnected. Thereafter, she was informed that the Company calculated that the current she had used, but which had not been registered on the tampered meter was in the amount of $100 and that amount plus a $100 deposit would have to be paid

*"A" followed by a number refers to the page in the Joint Appendix on Appeal.

before service was restored. She was further informed that if, upon review of her actual usage, the payment for the unmetered service proved to be high, any excess would be credited to her account (A. 84). Defendant accepts installment payments of sums due for service on tampered meters if customers are unable to pay the full amount (A. 88-89).

Plaintiff, through her attorney, sought to involve the Public Service Commission in requiring defendant to restore plaintiff's service. The PSC has no regulations dealing with disconnection of service by a utility for meter tampering and the PSC did not assert jurisdiction over this matter. On March 23, 1976, upon a request from a PSC Staff person, Con Edison, although not legally required to do so, voluntarily restored electric service to the plaintiff (A. 84-85).

Prior to moving to the involved premises, plaintiff resided in an apartment in a two-family house in Staten Island where her monthly bills from Con Edison for electricity were generally in excess of $30.00 and as high as $45.00 per month. She left that prior apartment owing Con Edison $221.24 for electric service, which amount was later paid by the Department of Social Services. In the two months following December 16, 1975, the date she became a customer of record at Con

Edison, her bills for electric service were in the order of $3.50 to $4.00, the minimum amounts provided under the Company's tariff, as her tampered meter reflected no usage. The previous occupant of the same apartment had monthly Con Edison bills that were generally in excess of $19 per month and as high as $30 per month (A. 85).

Transportation Corporations Law §15 (McKinney Supp. 1976) limits utility employees in entering customers' premises to specified hours for disconnection of service for non-payment. This section of the law explicitly applies to disconnections of service for non-payment and requires that disconnection be preceded by five days' written notice. It does not purport to deal with disconnection of service for meter tampering. Defendant did not give five days' notice and did not act or purport to act under color of this statute in disconnecting plaintiff's service. Defendant was empowered to disconnect plaintiff's service under its tariff regulations* which permit entry onto customer premises and disconnection of service in

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*Pursuant to Public Service Law §66, subd. 12, (McKinney Supp. 1976), Con Edison submits its rate schedule provisions to the PSC for filing. The Company's current rate schedule or tariff filed with the Commission is P.S.C. No. 8 - Electricity.

cases of meter tampering (A. 32, 34), and under common law which permits peaceful repossession of property by an owner.

Defendant Con Edison provides electricity service to some 2.8 million customers. The electricity is measured through meters furnished by the Company and located on the customer's premises. The meters remain the property of the Company at all times. Since the meters are within the control of the customers, the opportunity exists for tampering with the meters for the purpose of reducing the customer's payments for service. Con Edison estimates that it is losing millions of dollars yearly through theft of its electricity. This cost is passed on to its paying customers in the form of higher rates. In the interest of protecting its paying customers and minimizing its losses, the Company wishes to continue to be in a position to take swift and decisive action against customers who are found to be taking service through tampered meters (A. 28, 87).

SUMMARY OF ARGUMENT

Defendants contend that there is no state action involved in this case and therefore that plaintiff has failed to state a claim upon which relief could be granted. Con Edison's right to enter onto the premises of plaintiff Taylor and disconnect

her service after discovering her tampered meter is based on its tariff which is filed with the Public Service Commission, or its common law right to peacefully enter a customer's property and recover its meter or disconnect service when its tariff has been breached by the customer. Under defendant's tariff, a customer is responsible for safe-keeping of the Company's meter and protection of the meter against tampering. Further, the utility's representative is entitled to access to the customer's premises at all reasonable times for the purpose of reading and inspecting the meter (A. 31, 32). A customer who violates the tariff is subject to disconnection of service in such manner as may be permitted by law (A. 34). None of the tariff provisions upon which Con Edison relies in disconnecting plaintiff Taylor's service were ordered by the state PSC or have been the subject of any PSC proceeding, or in any way had the weight of the state behind them (A. 29).

The tariff constitutes an agreement between the utility and its customer and the Company, therefore, had a contractual right to enter the premises and disconnect service when it discovered the tampered meter. Transportation Corporations Law §15 which plaintiff, in her attempt to find state action, asserts as the legal basis for the Company's entry onto her

premises, is not applicable. That statute is concerned only with disconnection of service for non-payment, and we do not rely on it.

In addition to its rights under its tariff, defendant also has a self-help remedy at common law to make peaceful entry onto the property of a customer for the purpose of halting the conversion of its property or to recover its property. In the case at bar, the utility employee entered the premises to stop the continued unauthorized use of the Company's electricity by disconnecting the meter.

Even if state action were to be found by the court, defendant contends that the notice given by the Company prior to disconnection of her service, and the opportunity, which plaintiff did not take, to call Con Edison to discuss the impending disconnection and arrangements for payment of the electricity that she had received through the tampered meter, satisfied the requirements of due process.

Finally, the claim that plaintiff has been denied equal protection of the laws because Transportation Corporations Law §15 provides for a five-day notice to persons whose service will be terminated for non-payment is specious. It is entirely reasonable for the state to treat debtors differently

from persons found taking service through tampered meters.

POINT I

THE ACTION OF THE DEFENDANT IN TERMINATING SERVICE TO PLAINTIFF WAS NOT AN ACT UNDER COLOR OF STATE LAW.

Plaintiff, seeking a basis for federal jurisdiction under 42 U.S.C. §1983, relies on three bases for establishing that the defendant, Con Edison, acted under color of state law when it terminated plaintiff's service: 1) that Con Edison's "sole authority" for peaceful entry upon private property to recover its meters or disconnect service at the meter is New York Transportation Corporations Law §15; 2) that the general supervision of Con Edison's utility business by the New York State Public Service Commission is so pervasive as to establish Con Edison as a state actor; and 3) that the actions of the Public Service Commission in this case were sufficiently significant to establish that the disconnection of plaintiff's service was under color of state law (Appellants' Br., p. 8). Defendant, Con Edison, contends that not one of these three arguments by the plaintiff establishes the "sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that

of the State itself." Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351, 42 L. Ed. 2d 477, 484 (1974).

In the absence of a "sufficiently close nexus" between Con Edison's actions and that of the state, there is no state action and no basis for federal jurisdiction. Simply stated, plaintiff's claim is bottomed on 42 U.S.C. §1983 which requires that the alleged deprivation of plaintiff's rights be accomplished by the state, or some **party** acting in partnership with the state. Defendant Con Edison's actions in disconnecting plaintiff's service some twenty-four hours after discovering that she was taking service through a tampered meter were based on private tariff, contractual and common law rights. Accordingly, plaintiff's cause of action under 42 U.S.C. §1983 must fail as the actions of a private person cannot be construed to violate the statute. Shirley v. State National Bank of Connecticut, 493 F. 2d 739 (2d Cir.) cert. denied, 419 U.S. 1009, 42 L. Ed. 2d 284 (1974).

A. Defendant Con Edison's entry onto private property to terminate service was not under color of a state law.

In a vain effort to distinguish this case from Jackson v. Metropolitan Edison, 419 U.S. 345, 42 L. Ed. 477 (1974) where the United States Supreme Court held that the utility

company did not act under color of state law when it terminated for non-payment the electric service of the petitioner Jackson, plaintiff contends that defendant's sole authority to enter onto her property was Transportation Corporations Law §15. In fact, as will be shown in the following discussion, Con Edison relies on its tariff agreement as well as common law as authority to enter the property on which plaintiff is a tenant. Transportation Corporations Law §15 does not apply to this problem as it deals with entering customer property and disconnecting service for non-payment of bills. Plaintiff was disconnected for taking service through a tampered meter.

1. <u>Con Edison has the right to enter a customer's premises to disconnect its meters or terminate service pursuant to the terms of its tariff when the customer is taking service in violation of the Company's tariff.</u>

As a condition of service each customer is bound by the rules and regulations contained in Con Edison's tariff. A duly-filed tariff constitutes a contract between the customer and the Company. <u>W.R. Grace & Co.</u> v. <u>Railway Express Agency, Inc.</u>, 9 App. Div. 2d 425, 429(1st Dep't, 1959), <u>aff'd.</u>, 8 N.Y. 2d 103 (1960); <u>Slenderella Systems of Berkeley</u> v. <u>Pacific Tel. &</u>

<u>Tel. Co.</u>, 286, F. 2d 488 (2d Cir. 1961). With 2.8 million meters on private property, the Company would obviously be unable to protect itself from theft if it were unable to enter onto private property promptly and disconnect service when it discovered tampering.

Special Provision H of Service Classification No. 1 of defendant's tariff, the residential service classification under which plaintiff receives service from defendant; provides that the general rules, regulations, terms and conditions of the tariff apply to customers taking service under Service Classification No. 1 (A. 89, 92). General Rule III, 11(c) of the tariff provides that:

> ". . . the Customer shall not permit access by anyone except authorized employees of the Company, to the meters, equipment, or any other property of the Company, <u>and shall not interfere or permit interference with the same; and the Customer shall be responsible for their safe-keeping on his premises.</u> The Company's duly authorized representatives shall have the right of access to the premises of the Customer and to all of the Company's property thereon at all reasonable times for the purposes of reading and testing meters, inspecting equipment used in connection with its service, metering the demand, ascertaining and counting the connected load of the Customer's installation, removing its property or any other proper purpose." (emphasis added, A. 32).

This provision of Con Edison's tariff and General Rule III, 15(b) (A. 34) which permits the Company to discontinue service to any customer violating its tariff rules, both of which became effective following the Company's submission of them to the PSC, without any affirmative action of the Public Service Commission (A. 29), permitted the Company to discontinue service to plaintiff when she was found to be taking service through a tampered meter. Further, they represent sufficient authority for Con Edison to enter the property at the plaintiff's residence to terminate its service to the plaintiff.

In Hitchcock v. Essex & Hudson Gas Co., 71 N.J.L. 565, 61 A.397(1905), the customer had agreed in its application for utility service that the utility could have access to the premises at all reasonable times, and that on violation of the company's rules, the utility could disconnect its meters. The New Jersey Court of Errors and Appeals, held that the utility could rely on its agreement and had not trespassed when its employee, after having been denied access, forced a lock on the cellar door to gain access for the meter removal.

In Jackson v. Metropolitan Edison, supra, the Court found that in the absence of affirmative action by the state regulatory agency, reliance by the utility in disconnecting

service on tariff provisions duly filed with the agency, did not constitute state action. Approval of a tariff filing by a state utility commission "where the Commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the Commission into state action". Id. at 357, 42 L. Ed. 2d at 487.

Whether the Jackson decision is grounded upon the contractual relationship of the parties, or the fact that by law a tariff provision is binding upon the customer is not entirely clear, nor is it material. The case teaches that there is no state action involved when a utility disconnects service of a customer in accordance with the utility's tariff provisions, when the action has not been ordered by the state agency and when the provision relied upon was not included in the tariff as a result of some significant state action.

2. Con Edison has a common law right to peacefully enter onto its customer's premises to disconnect a meter when the customer is no longer entitled to service.

At common law a person may enter onto another's premises where the latter is wrongfully holding the first person's chattel in order to recover that chattel, and no action for

trespass will lie. Davis v. United States, 328 U.S. 582, 90 L. Ed. 1453 (1946); Madden v. Brown, 8 App. Div. 454 (4th Dep't 1896); Scribner v. Beach, 4 Dennio 448, 451-52 (N.Y. 1847); See also Restatement 2d of Torts, §183 (1) (1965); 1 Harper & James, Torts, §1.17; 61 N.Y. Jur. Trespass §33 (1968). When a customer has violated the tariff in permitting access to his or her meter by an unauthorized person who tampers with the meter, the utility has the right to protect itself from further loss by peaceful self-help. The Supreme Court noted in Jackson v. Metropolitan Edison Co., supra, that the utility's right to terminate service for non-payment existed at common law (fn. 11 419 U.S. at 355, 42 L. Ed. 2d at 486).

Con Edison's employees enter customer property as a necessary and regular part of the Company's business and with the consent of its customers. Certainly, there can be no assertion that plaintiff protested defendant's entry. The law does not prohibit a party from peacefully halting a misappropriation of his goods or services and from refusing to continue to do business with the person who was using the misappropriated property. Entrance onto the property of another to recover one's property without a breach of the peace is no trespass.

It is ludicrous to suggest that defendant may not take peaceful action to stop the misappropriation of its service,

and indeed, plaintiff's cases do not support the argument. Heermance v. Vernoy, 6 Johns. 5 (N.Y.1810) Blake v. Jerome 14 Johns. 406(N.Y. 1817), are readily distinguishable from the present case. In those cases, the court in each instance upheld a verdict of trespass against defendants entering another's real property to recover what the defendant believed was his wrongfully held personal property. In both cases, there were substantial doubts as to whether the person charged with trespassing had title to the personal property in question. These cases are distinguished on this basis in Richardson v. Anthony, 12 Vt. 273, 278 (1840).

Goff v. Kilts, 15 Wend. 550(NY 1836) and Newkirk v. Sabler, 9 Barb. 652(N.Y. 1850), are both easily distinguishable because the chattels sought to be recovered were on the plaintiff's property in each case without his permission. Fortescue v. Kings County Lighting Co., 128 App. Div. 826 (2d Dep't 1908), Brissette v. Con Edison, New York Law Journal, April 26, 1976, p. 6,col. 1 (App. T., 1st Dep't), Reed v. New York & Richmond Gas Co., 93 App. Div. 453 (2d Dep't 1904); and Vilardi v. Consolidated Edison Company of New York, Inc., 63 Misc. 2d 623 (1970), all involved forcible entry or entry through a closed or locked door over the objection of the property owner.

The case at bar involves a peaceful non-contested entry onto the property on which plaintiff is a tenant in a two-family house, to disconnect service at a meter owned by Con Edison located on an outer wall of the house.

Dobbs v. Northern Union Gas Co., 78 Misc. 136 (App. T. 1st Dep't 1912) is completely inapplicable to the present case as it involves a finding of trespass when the utility employee entered a customer's home to disconnect service for which the customer had already paid. Similarly, Goblet v. New York Power & Light Corp., 267 App. Div. 1030 (3d Dep't 1944), stands for the proposition that a utility is liable for trespass if it enters a customer's property and disconnects service in the mistaken belief that the customer is in arrears.

The common law on this question was clearly stated in Madden v. Brown, 8 App. Div. 454, 455 (4th Dep't 1896).

> "It is well settled that the owner of personal property which has wrongfully been taken from him does not commit a trespass by entering on the realty of the wrongdoer and taking his own property unless he commits a breach of the peace or uses unnecessary force."

The Supreme Court has gone even further and declared that the recovery of property from a person unlawfully possessing it will even justify a trespass. Davis v. United States, 328 U.S. at 591, 90 L. Ed. at 1458. Clearly, Con Edison's entry onto plaintiff's premises was permissible at common law.

3. <u>TCL §15 deals only with disconnection of service for non-payment and does not apply to disconnection for meter tampering.</u>

Plaintiff contends that Con Edison's "sole authority" for entry onto her property is Transportation Corporations Law §15, a statute which is in fact restricted to discontinuance of utility service in the event of nonpayment by the customer. Both the text and history of Transportation Corporations Law §15 make it plain that the statute is inapplicable to cases in which a utility seeks to disconnect service for any reason other than nonpayment by providing that:

> "If any person supplied with gas or electric light . . . shall refuse or neglect to pay the rent or remuneration due for . . . using such gas or electric light . . . [the utility] may discontinue the supply of gas or electric light to the premises of such person."

Refusal or neglect to pay the rent or remuneration due is the sole predicate for utility action under this statute. It then goes on to provide that representatives of the utility may enter the premises between 8:00 a.m. and 6:00 p.m. to discontinue service, but only after five-days' written notice has been given to the customer.

In 1859, a statutory limitation was placed on utilities in the forerunner of Transportation Corporations Law §15

requiring that disconnection be accomplished between 8:00 a.m. and 6:00 p.m. N.Y. Laws of 1859, Ch. 311 §9. In 1935, the five-day notice requirement was added to the law requiring such notice in case of disconnection "for any cause". N.Y. Laws of 1935, Ch. 481. This amendment resulted in a court decision that persons found tampering were entitled to five days' notice before disconnection, Fisher v. Long Island Lighting Co., 280 N.Y. 63 (1939), a result plainly unintended by the legislature. The law was again amended two years later to limit, as it presently does, the five-day notice right to cases of disconnection for non-payment. N.Y. Laws of 1937, Ch. 545. A memorandum in the bill jacket by Senator Burchill, sponsor of the legislation, which is appended to this Brief states that:

> "The obvious purpose for the enactment of Chapter 481 of the laws of 1935 was to make sure that sufficient notice would be given any consumer before his gas or electric supply would be cut off, where the cause for disconnection was non-payment for service rendered. This would seem to be a fair and reasonable requirement where it is proposed to disconnect service for non-payment only, but the necessity for giving five days' notice before disconnecting service where there has been tampering with meters by installing apparatus or equipment to by-pass meters, or to steal gas or electric current, is not only unduly burdensome to the companies but in effect sanctions stealing of gas

> and electric current, and permits the continued existence of possibly dangerous conditions for a period of at least five days.
>
> "It seems evident that gas and electric companies, in the performance of their duties to the public, as prescribed by Section 65, subdivision 1, of the Public Service Law, to render safe and adequate service, must be able to disconnect service where an unsafe condition exists, and without delay."

Aside from the fact that Transportation Corporations Law §15 does not apply to disconnections of utility service for tampering, it could not be considered a basis for finding state action in this case because it leaves full discretion of action to the utility. It does not order a utility to enter customer property, it sets forth the conditions under which a utility <u>may</u> enter customer property to discontinue service in the event of nonpayment.

> "[A utility's] exercise of the choice allowed by state law where the initiative comes from it and not from the State, does not make its action in doing so 'state action' for the purposes of the Fourteenth Amendment."

<u>Jackson</u> v. <u>Metropolitan Edison Co.</u>, 419 U.S. at 357, 42 L. Ed. 2d at 487 (footnotes omitted); <u>accord</u>, <u>Broderick</u> v. <u>Associated Hospital Service of Philadelphia</u>, 536 F. 2d 1 (3d. Cir.

1976); Particular Cleaners, Inc. v. Commonwealth Edison Co., 457 F. 2d 189, 191 (7th Cir. 1972); cert. denied, 409 U.S. 890 34 L. Ed. 2d 148 (1972); Srack v. Northern Natural Gas, 391 F. Supp. 155, 157 (S.D. Iowa 1975).

In no way did the State of New York or any of its subdivisions, take any affirmative action to order or even influence, Con Edison's disconnection of service actions in the instant case. Even if we were to disregard Con Edison's common law and tariff rights to enter the property and assume that it could rely on the statute, it is clear that where the statute offers a choice of action rather than ordering it, there is not sufficient action by the state to constitute state action in violation of the Fourteenth Amendment of the Constitution.

4. Con Edison's action to terminate the plaintiff's service is similar to the actions of secured creditors pursuant to UCC §9-503 which has been found not to be state action.

Con Edison's tariff provisions permitting it to disconnect service in the event of breach in the rules are not unlike the self-help provisions of the Uniform Commercial Code which allows secured parties upon default the right to take possession of the collateral without judicial process if it can be done without a breach of the peace. UCC §9-503. Confronted with

such a statute, this court held that such action was not under color of state law. Shirley v. State Nat'l. Bank of Connecticut, 493 F. 2d 739 (2d Cir.) cert. denied, 419 U.S. 1009, 42 L. Ed. 2d 284 (1974). The court noted that the statute in question did not create any right that did not already exist in common law or in contract, and in fact, it stated that the statute in question placed limitations on such seizures. Id. at 742. It is also noted that the state did not encourage the seizures or in any way actively aid or abet the secured party, and most significantly, left the decision to repossess entirely to the secured party. Id. at 743. Similar holdings or actions under other states' self-help statutes are numerous. Bond v. Dentzer, 494 F. 2d 302 (2d Cir.), cert. denied, 419 U.S. 837, 42 L. Ed. 2d 63 (1974); Adams v. Southern California First Nat'l Bank, 492 F. 2d 324 (9th Cir. 1973), cert. denied, 419 U.S. 1006, 42 L. Ed. 2d 282 (1974); Nowlin v. Professional Auto Sales, 496 F. 2d 16 (8th Cir.) cert. denied, 419 U.S. 1006, 42 L. Ed. 2d 283 (1974); Fletcher v. Rhode Island Hospital Trust Nat'l Bank, 496 F. 2d 927 (1st Cir.) cert. denied, 419 U.S. 1001 42 L. Ed. 2d 277 (1974); Gibbs v. Titelman, 502 F. 2d 1107 (3d Cir.), cert. denied, 419 U.S. 1039, 42 L. Ed. 2d 316 (1974); Davis v. Richmond, 512 F. 2d 201 (1st Cir. 1975); Turner v.

Impala Motors, 503 F. 2d 607 (6th Cir. 1974); James v. Pinnix, 495 F. 2d 206 (5th Cir. 1974); Bichel Optical Lab., Inc. v. Marquette Nat'l Bank of Minneapolis, 487 F. 2d 906 (8th Cir. 1973); Calderon v. United Furniture Co., 505 F. 2d 950 (5th Cir. 1974); McDuffy v. Worthmore Furniture, Inc., 380 F. Supp. 257 (E.D. Va. 1974).

See also, Anastasia v. Cosmopolitan Nat'l Bank of Chicago, 527 F. 2d 150 (7th Cir. 1975), cert. denied, 44 U.S.L.W. 3473 (Feb. 24, 1976), upholding the right of a hotel keeper to seize the personal property of a non-paying guest pursuant to a state lien law without notice or hearing.

In view of the foregoing, it is quite clear that defendant's termination of service to plaintiff could properly be based on its tariff and common law rights.

B. A scheme of pervasive utility regulation does not establish state action. The actions of the Public Service Commission in this case do not establish state action.

Plaintiff has put forth an assortment of reasons to show the requisite nexus between the state and Con Edison's action in her attempt to establish state action in this case (Appellants' Br., pp. 14-19). We will discuss each of plaintiff's contentions in turn.

1. <u>Pervasive state regulation does not establish state action.</u>

The pervasive involvement of the state in the regulation of electric utilities and their termination procedures for non-payment does not establish the specific connection between the state and the action complaint of which is required for a finding of state action. Plaintiff has failed to show the active involvement of the state in the termination of service to plaintiff. In the words of the Supreme Court:

> "The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment. Nor does the fact that the regulation is extensive and detailed, as in the case of most public utilities, do so."

<u>Jackson</u> v. <u>Metropolitan Edison Co.</u>, 419 U.S. 345, 350-357, 42 L. Ed. 2d 483-484 (1974).

Plaintiff cites the PSC's rules in 16 NYCRR, Part 143 as evidence of the PSC's and hence the state's involvement in discontinuance of service (Appellants' Br., p. 15). But, Part 143 is specifically limited to discontinuances of service for non-payment. It does not deal with discontinuance of service for other reasons as, for example, unsafe conditions or meter tampering. It, therefore, is inapplicable to this case.

Finally, that there exists a general complaint procedure in Public Service Commission regulations, 16 NYCRR §11, does not establish sufficient state action in this case. If it did, every business which is in some way subject to the complaint procedures of any of the various consumer protection agencies would have to be considered state actors. Indeed, every individual is subject to suit in state court under procedures established in New York's Civil Procedure Law and Rules and under the state's substantive laws. This hardly makes every individual's action for which he may be sued in state court state action.* "Subjecting all behavior that conforms to state law to the Fourteenth Amendment would emasculate the state action concept" Adams v. Southern California First National Bank, 492 F. 2d 324, 331 (9th Cir. 1973).

Plaintiff further asserts that the Public Service Commission has the authority under 16 NYCRR §11.3(d) to order continuation of service pending determination of a complaint and that this establishes sufficient state action. However, the

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*See, Jackson v. Metropolitan Edison, where the court notes that if all the activities of persons subject to state regulation were to be considered state action "then presumably the actions of a lone Philadelphia cab driver could also be fairly treated as those of the State of Pennsylvania,"419 U.S. at 352, 42 L. Ed. 2d at 484, n. 7.

interim relief of precluding discontinuance of service is specifically limited to "cases regarding bills or deposits". It does not apply to tampering cases.

2. <u>Con Edison's tariff provisions applicable to tampering were filed on its own initiative and without PSC encouragement or significant action.</u>

The sections of defendant's tariff rules under which it was empowered to discontinue service to plaintiff were all filed on defendant's initiative and became effective without any significant action by the PSC (A. 29). They provide in General Rule III, 11(c), in part, that the customer is responsible for protecting the meter on his property, and further that the customer may not allow access to defendant's meter by an unauthorized person (A. 32). This same rule permits utility access to the customer's meter at all reasonable times for the purpose of reading, testing or removing the meter or any other proper purpose. Tariff General Rule III, 15 permits the Company to discontinue service if the customer fails to comply with any applicable provisions of the tariff. It reads as follows:

"15. Discontinuance or Withholding of Service.

In addition to the provisions of the Service Classifications as to the term of their respective agreements for service, the Company reserves the right to withhold service or to discontinue service or terminate any agreement therefor, in such manner as may be permitted by law under the circumstances: (a) if the Customer at any time refuses or fails to make application and agreement for service as provided by this Rate Schedule, or (b) if the Customer refuses or fails to comply with any applicable provision, rule, regulation, term or condition of this Rate Schedule, or with any applicable law or order of the Public Service Commission or other authorities having jurisdiction, or if the Customer's installation or part thereof is deemed by the Company to be unsafe, inadequate or unsuitable for receiving the Company's service, or to interfere with or impair the continuity or quality of the Company's service to the Customer defaults in the payment of a bill rendered for service or fails to post a required deposit, and the Company has complied with:

1. The procedures and form of notice required by Subchapter D, Chapter II, Title 16 of the New York Code of Rules and Regulations, Part 143, Rates and Charges, except to the extent, if any, that such requirements may be modified or waived by the Commission, or

2. The procedure and form of notice by Section 116 of the Public Service Law, where service is to an entire multiple dwelling (as is defined in the Multiple Residence Law) provided, however, that when any of the notices required thereunder is mailed

> in a post-paid wrapper service will not be discontinued until at least eight days after the mailing of such notice.*

As noted in the record below (A. 29), subparagraphs 1 and 2 of Rule III, 15(c), which establish procedures to be followed in case of discontinuance of service for non-payment were added to the tariff on order of the PSC. Plaintiff asserts that this demonstrates that the state was affirmatively involved in the discontinuance of her service (Appellants' Br., p. 15). In fact, however, defendant relies, not on Rule III, 15(c), but on Rule III, 15(b) which permits discontinuance of service for failure to comply with applicable provisions of the tariff. As shown earlier, Rule III, 15(b) was not ordered to be included in defendant's tariff by the PSC, it was included there on defendant's initiative and became effective as filed without any PSC encouragement or significant action.

3. <u>The Howell Case deals with theft of service from other customers. The PSC has taken no significant action in that case.</u>

An unrelated action, <u>Howell</u> v. <u>Consolidated Edison</u>, 76 Civ. 2505 (M.E.F.) (S.D.N.Y.) has been brought against Con

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*General Rule III, 15(c) was inserted in the Company's tariff pursuant to PSC Order in Case 26358, 13 N.Y.P.S.C. 834 (1973). Appellants' brief erroneously cites PSC Opinion and Order No. 73-20 as the authority for this tariff provision.

Edison and the PSC. Plaintiff claims that Howell is "functionally undistinguishable" from the circumstances in the case at bar and that the PSC "has now agreed to hold hearings and continue service in cases where it is alleged that meters and/or wires have been tampered with in such a manner that bills including charges for services diverted, stolen or otherwise utilized by a third party" (Appellants' Br., p. 16).

The Howell case, which like the case at bar, is being handled by attorneys from the Legal Aid Society, involves not tampering, which results in misappropriation of current from the Company without being recorded on a meter, but rather, misappropriation of current which passes through the meter of a customer and is then diverted by an unauthorized third party for his or her own use. In the case at bar, the current has been taken without payment from the Company, while in Howell, it has been taken without payment from a customer.

While the PSC has not asserted jurisdiction over utility practices dealing with persons receiving current through tampered meters (either because the Commission does not feel that it has jurisdiction, or on the theory that the Company is capable of protecting itself) it is not inconceivable that the Commission

might wish to seek to establish procedures to protect the customer whose current is being divered as in the *Howell* case. In any event, the PSC has not taken any action in *Howell* beyond that described in the stipulation Annexed to Appellants' Brief.

Paragraph 1 of the stipulation provides for an adjournment of the matter "pending a review and determination by the Public Service Commission . . . of its policies and practices with respect to the handling and resolution of cases in which Consolidated Edison Company of New York, Inc. . . . seeks to discontinue the electric service of residential customers for non-payment of bills which include charges for services diverted stolen, or otherwise utilized by a third party". In *Howell*, too the plaintiffs, in bringing the matter before a federal court, have alleged state action by the PSC. Paragraph 3 of the stipulation provides that "Nothing contained in the stipulation shall be deemed to represent the position of any of the parties hereto with respect to any issue presented in the above-entitled action." It is clear from the stipulation that the parti did not intend the PSC's agreement to consider its practices to be determinative of the issue of state action. The Commission was merely seeking to maintain the *status quo*

during the period of its internal review. Plaintiff and her attorneys, however, have attempted to use the stipulation as a basis for finding state action in the case at bar.

4. <u>The refusal of the Public Service Commission to act in response to plaintiff's complaint does not establish state action in this case.</u>

The plaintiff claims that the actions of the Public Service Commission in response to her complaint regarding the termination of her service constitutes state action. The sum of the Commission's actions was, if anything, inaction in the form of a response to the plaintiff that the Commission had no jurisdiction in this matter.

Defendant voluntarily restored service to plaintiff upon the request of a PSC Staff member. There was no order given by the PSC to restore service and there could not be because the Commission does not have regulations governing procedures for disconnecting customers receiving service through tampered meters (A. 24, 99-101).

To assert that there is sufficient state action to raise private actions to the level of state actions where the aggrieved party unsuccessfully seeks to involve the jurisdiction of a state body, would permit any person to assert state action any time a state agency has no jurisdiction and refuses to act

in a matter. This could not possibly have been the intention of the framers of the Fourteenth Amendment or Congress in 42 U.S.C. §1983.

Obviously, plaintiff is seeking to hoist herself by her own bootstraps. She has sought to prod the PSC into involvement in this matter and, after her invitation has been declined by the Commission Staff personnel, she seizes upon the declination as an affirmative act by the Commission and the State. <u>Jackson</u> demands significant state involvement before state action can be found. By no stretch of the imagination can the PSC's non-involvement in this matter be considered state action.

POINT II

CON EDISON'S TERMINATION OF PLAINTIFF'S ELECTRIC SERVICE AFTER THE DISCOVERY OF TAMPERING DID NOT DEPRIVE HER OF DUE PROCESS OF LAW.

Even if the Court should find state action in this case, we believe that the actions taken with regard to plaintiff did not constitute a deprivation of her rights without due process of law.

Con Edison's policy in cases where tampering is discovered is not to disconnect residential service immediately except in cases where the tampering may create conditions hazardous to life or property, but to defer disconnection for one day thereby providing the customer with an opportunity to pay the amount estimated to be due for misappropriated current and a deposit where applicable. On that day the customer may make payment, arrangements, including installment payments, or otherwise seek to persuade the Company not to discontinue service. In fact, plaintiff made no effort to communicate with the Company in the time available and her service was then disconnected. If the Company is made aware of seriously ill or injured persons on the premises, its procedure provides for a review of the matter by the Division Vice President (A. 24, 25).

It is noteworthy in this regard that although Justice Marshall in dissenting in Jackson v. Metropolitan Edison Co., supra argued that the customer had been deprived of due process of law by the utility's termination of her service without notice, he also took the position that minimum due process requirements would be met with advance notice of a proposed termination and "a clear indication that a responsible Company official can readily be contacted to consider any claim of error" 419 U.S. at 373, 42 L. Ed. 2d at 497. Con Edison's procedures satisfy this definition.

Plaintiff relies on Goldberg v. Kelly, 397 U.S. 254, 25 L. Ed. 2d 287 (1970) in support of her contention that she has been denied due process of law. There the Court was persuaded that the state had opportunities to minimize welfare fraud with prompt pre-termination hearings and better administration, 347 U.S. at 266, 256, L. Ed.2d at 298. These opportunities are unavailable to Con Edison for a number of reasons: 1) Con Edison does not have any control over any Public Service Commission apparatus for pre-termination hearings; 2) while improved screening of welfare clients could reduce welfare cheating, there is no improved preventive administrative pro-

cedure that could be utilized to avoid misappropriation of service. Con Edison is required to provide service to any customer within a specific distance of its facilities provided the customer does not owe money for past service. Transportation Corporations Law §12, (McKinney's Supp. 1976); and 3) Con Edison, unlike the State, is a private corporation, and cannot easily bear the losses that might have to be absorbed by the drawn-out procedure involved in adjudicating a termination of service for tampering and misappropriation. In fact, such imposed losses would border on unlawful deprivation of Con Edison's property. Stone v. Farmers Loan & Trust Co., 116 U.S. 307, 29 L. Ed. 636 (1886). In 1975, Con Edison charged off over $52 million to its uncollectible bills accounts (A. 29). To the extent that the Company is required to continue service to customers who have demonstrated a proclivity to use current without paying for it, the Company increases its exposure to further loss.

A recent Supreme Court pronouncement on due process is particularly relevant to this case.

> "'"Due process," unlike some legal rules, is not a technical concept with a fixed context unrelated to time, place and circumstances.'

> Cafeteria & Restaurant Workers Local 473 v. McElroy, 367 U.S. 886, 895, 6 L. Ed. 2d 1230, 81 S. Ct. 1743 (1961). '[D]ue process is flexible and calls for such procedural protection as the particular situation demands.' Morrissey v. Brewer, 408 U.S. 471, 481, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (1973). Accordingly, resolution of the issue whether the administration procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected."

Matthews v. Eldridge, _____U.S.______, 47 L. Ed. 2d 18, 33 (1976).

And where the both sides to the dispute are private parties as in the case of repossession of the property of one the Court has noted that, "Resolution of the due process question must take account not only of the interests of the buyer of the property but those of the seller as well." Mitchell v. W. T. Grant Co., 416 U.S. 600, 604, 40 L. Ed. 2d 406, 412 (1974).

Significantly, there is no allegation by plaintiff that defendant might disconnect service to a party who has not been receiving service through a tampered meter. Certainly such a person would be entitled to redress and it would be available in an action for damages. It is, however, difficult, if not impossible, to conceive of an erroneous disconnection since

the tampered meter would have been identified, and the disconnection would be made at the same meter.

It is established and unquestioned that plaintiff received and failed to pay for electricity taken from Con Edison through a tampered meter, all to the detriment of defendant and its other customers. Even if plaintiff were not barred at the threshhold in this matter by her failure to show that state action is involved, it is clear that she cannot be said to have been deprived of due process.

POINT III

TRANSPORTATION CORPORATIONS LAW §15 AND THE REGULATIONS IMPLEMENTING IT DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT BY REQUIRING THAT CUSTOMERS OF GAS AND ELECTRIC CORPORATIONS BE ACCORDED CERTAIN RIGHTS BEFORE SERVICE TO THESE CUSTOMERS CAN BE DISCONTINUED FOR NON-PAYMENT OF BILLS WHILE NOT PROVIDING THE SAME RIGHTS TO CUSTOMERS WHO RECEIVE SERVICE THROUGH TAMPERED METERS.

Plaintiff contends that Transportation Corporations Law §15 and the regulatory scheme of the Public Service Commission implementing it violate the equal protection clause of the Fourteenth Amendment of the Constitution, in providing at least five days' of notice and an established procedure including an

opportunity for hearing to persons subject to discontinuance of service for non-payment, while not providing the same notice and procedures for persons subject to discontinuance of service for tampering. Plaintiff also makes the antic assertion that since Con Edison, after disconnecting the tampered meter, required payment before reconnecting, she is entitled to the same procedural rights afforded to customers turned off for non-payment.

To briefly summarize the relevant legislative history of Transportation Corporations Law §15 (supra at 19-21), prior to 1935 there was no requirement that notice of any sort be given to a customer prior to discontinuance of service to him; in 1935 the Legislature amended the section to require the corporation to give notice prior to discontinuance "for any cause"; and in 1937, the section was again amended to require notice only in cases of non-payment of bills. In Morris v. Consolidated Edison Company of New York, Inc., 265 App. Div. 743 (1st Dep't 1943), it was unanimously held that the 1937 amendment to Section 15 was intended to permit gas and electric corporations to terminate service without first providing five days' written notice to customers who tamper

with utility meters. These judicial and legislative actions were based on the sensible and rational premise that different procedures could properly be followed in disconnecting service to persons who owed a utility money for service properly taken as opposed to those who took service through tampered meters.

The plaintiff's claim to equal protection is specious on its face. In order to sustain it, this court would be required to find that the distinction made by TCL §15 between persons receiving service through tampered meters and customers who have failed to pay their bill is unreasonable. That is, the court must conclude that the Legislature could not decide to treat persons who have not yet paid their bills for service differently from persons who have received service through tampered meters; that it could not afford the former group protection from immediate discontinuance of service without at the same time providing the same degree of protection to the members of the latter group, who are receiving misappropriated service.

Initially, it should be noted that the differentiation between tamperers and persons who have failed to pay their bills is not a "suspect" classification. In Frontiero v. Richardson, 411 U.S. 677 36 L. Ed. 2d 583(1973),the Supreme Court overturned a statute which permitted a married serviceman to obtain increased quarters allowance and medical benefits without establishing that his wife was dependent upon him for more than one-half of her support, but which required a servicewoman to make such a showing with regard to her husband before receiving increased benefits. The Court held that the statute denied female members of the armed services equal protection of law. Justice Brennan, in an opinion joined by three justices, stated that a classification based upon sex is a suspect classification.

> ". . . since sex like race and origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship, to individual responsibility . . .' Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 31 L. Ed. 2d 768, 92 S. Ct. 1400 (1972). And what differentiates sex from such nonsuspect statutes as intelligence or physical disability, and aligns it with the recognized suspect criteria is that the sex charac-

> teristic frequently bears no relation to ability to perform or contribute to society." 411 U.S. at 686.

Meter tampering is not "an immutable characteristic" determined solely by birth. The distinction made by Transportation Corporations Law §15 between tamperers and non-tamperers clearly bears "some relationship to individual responsiblity". Tamperers are treated differently by Section 15 not because of some characteristic of their being thrust upon them by fate or accident, but because they have consciously chosen to break the law. In short, meter tamperers are made and not born.

If the distinction drawn by a state statute or regulation between persons is not based on an inherently suspect basis, such as race, nationality or creed, the federal courts are bound to uphold the statute or regulation if a rational basis exists for the differentiation. Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 35 L. Ed. 2d 351 (1973); McGinnis v. Royster, 410 U.S. 263, 35 L. Ed. 2d 282 (1973); Lindsey v. Normet, 405 U.S. 56,31 L. Ed. 2d 36 (1972); James v. Strange, 407 128 32 L. Ed. 2d 600 (1972) and Dandridge v. Williams, 397 U.S. 471, 25 L. Ed. 2d 491 (1970).

The test to determine the constitutionality of non-suspect classification has been stated by the United States Supreme

Court in McGowan v. Maryland, 366 U.S. 420, 6 L. Ed. 2d 393 (1961), as follows:

> ". . . the Fourteenth Amendment permits the States a wide range of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional powers, despite the fact that, in practice, their laws, result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. (citations omitted)." 366 U.S. at 425-6.

The decision of the New York State Legislature in 1937 to amend Transportation Corporations Law §15 to relieve gas and electric corporations from the burden of giving tamperers notice of their intent to discontinue service while continuing to require that written notice be given to customers who have failed to pay their bills clearly rests on a rational basis. A customer who receives current through a tampered meter is receiving misappropriated property. Meter tampering is a crime prohibited by §165.15(5) of the New York Penal Law.* The cost

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*By legislation enacted subsequent to the events involved in this case, a person receiving service through a tampered meter is presumed to be responsible for the tampering, and may be found guilty of a misdemeanor. N.Y. Laws of 1976, Ch. 768; Penal Law §165.15.

of gas or electric current misappropriated by tamperers is borne by a utility's honest customers. In addition, tampering is often accomplished in such a manner as to create a threat to public safety. It is obvious that the Legislature in 1937 could legitimately decide to not require that notice be given to a tamperer before service to him is discontinued. The Legislature must have felt that it was inappropriate to require a utility, the victim of a theft, to continue to provide service to the person receiving the benefit of the theft during the notice period. Requiring such notice would often simply permit the tamperer to move out before the Company could collect for the misappropriated current.

Plaintiff cites <u>Stanley</u> v. <u>Illinois</u>, 405 U.S. 645, 31 L. Ed. 2d 551 (1972) as establishing "that a state deprives a person of equal protection of its laws when it arbitrarily denies him the same hearing rights than [sic] it provides to others who are similarly situated". Although we are willing to accept plaintiff's interpretation of this case as a fair one, we fail to see how the reasoning supports plaintiff's contention. A tamperer and a person who has failed to pay their bills are not "similarly situated". One person has committed a crime or at least received misappropriated service, the other

simply has failed to pay an overdue account. Given this patent dissimilarity, it is obvious that a state can establish elaborate procedures to be followed prior to discontinuance for non-payment of bills and not require the same procedures for persons receiving service through tampered meters without thereby running afoul of the constitutional requirement of equal protection of laws.

Little need be said of plaintiff's straight-faced assertion that she is entitled to be treated as any other ordinary non-paying customer after Con Edison demanded payment for current used and a deposit before turning on her service. In Morris v. Consolidated Edison, supra, the court declared that misappropriation of current was a tort and that the customer was not entitled to a bill for service therefor, nor to notice of termination under the statute for failure to pay therefor. Id. at 746. It is clear that subject termination was not for non-payment of bills rendered for service or for failure to pay a required deposit, and that plaintiff was not entitled to the procedural rights given to customers who are subject to discontinuance of service for non-payment.

CONCLUSION

For all of the reasons set forth above, defendants/ appellees respectfully request that the District Court's Order herein be sustained.

Respectfully submitted,

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Dated: November 8, 1976

APPENDIX

Memorandum in support of proposed amendment to
Chapter 481 of the laws of 1935 relating to
notice of discontinuance of service

Senate Int. 1440 Print 1687

by

Senator Burchill

Chapter 481 of the laws of 1935 amends Section 15 of the
Transportation Corporations law by providing that gas or
electric service should not be discontinued for any cause
without giving a five-day written notice, either personally or
by registered mail, to the person whose service is to be
discontinued.

The experience of the various gas and electric companies
in the state shows that the restrictions imposed by this
amendment to section 15 of the Transportation Corporations law
have been unduly costly and burdensome to the companies as well
as annoying to customers.

The obvious purpose for the enactment of Chapter 481
of the laws of 1935 was to make sure that sufficient notice
would be given any consumer before his gas or electric supply
would be cut off, where the cause for disconnection was non-
payment for services rendered. This would seem to be a fair
and reasonable requirement where it is proposed to disconnect
service for non-payment only, but the necessity for giving five
days' notice before disconnecting service where there has been
tampering with meters by installing apparatus or equipment to
by-pass meters, or to steal gas or electric current, is not
only unduly burdensome to the companies but in effect sanctions
the continued
stealing of gas and electric current, and permits the continued
existence of possibly dangerous conditions for a period of at
least five days.

It seems evident that gas and electric companies, in
the performance of their duties to the public, as prescribed
by Section 65, subdivision 1, of the Public Service Law, to
render safe and adequate service, must be able to disconnect
service where an unsafe condition exists, and without delay.

Section 1431 and Section 1431-a of the Penal Law
make it a misdemeanor to tamper with electric or gas meters.
Surely Chapter 481 of the laws of 1935 should not be deemed to
afford a period of grace to one who is committing a misdemeanor.

In order to avoid any uncertainty as to the law on this subject, it is recommended that the words "for any cause" contained in Chapter 481 of the Laws of 1935, be amended to read "for non-payment of bills rendered for service."

Chapter 481 of the Laws of 1935 further requires that the five-day written notice be given either personally or by registered mail. It is estimated that in not one case out of one hundred would a notice sent by first class mail, rather than by registered mail, fail to reach the addressee. In most cases notices addressed to the average residential consumer of the gas and electric companies in the state would actually be received by them sooner if sent by ordinary first class mail and left at the residence in the absence of the customers. Then the customers would find the notices when they returned to their homes. If sent by registered mail as is presently being done by law, a notice is left by the postman for the addressee to call at the Post Office and claim a registered letter. The annoyance of the customer entailed by having to make a trip to the Post Office to collect a notice that service will be discontinued can readily be imagined. Frequently, by the time he has actually received the registered letter from the Post Office, two or three of the five days have elapsed. Also, the postman usually knows the contents of such a letter as he carries a considerable quantity of them in the course of his daily rounds. It is certainly embarrassing to a customer to have to sign a receipt for such a letter. Thus it is apparent that the provisions of Section 15 of the Transportation Corporations Law, as amended by Chapter 481 of the Laws of 1935, insofar as they provide for five days' notice by registered mail before service can be discontinued for any cause, are definitely burdensome, costly and contrary to the public interest, and these provisions should be amended as shown in the attached draft of a proposed amendment which would limit the necessity for a five day notice before discontinuance of service to cases where service is to be discontinued for non-payment of bills rendered for service, and which would require personal service and service by ordinary mail, rather than by registered mail.